IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITON NO.3551 OF 1991

Tanna Builders Pvt.Ltd. ..Petitioner.

V/s.

Smt.Neela Krishnan & Anr. ..Respondents.

Mr.P.J.Pardiwalla i/b.Kanga & Co. for petitioner.

Dr.P.Daniel with A.S.Rao i/b. Pankaj Kapoor for respondents.

CORAM : V.C. DAGA AND J.P.DEVADHAR, JJ.

DATED : 16TH AUGUST, 2005.

ORAL JUDGMENT (PER V.C.DAGA, J.)

1. This petition is directed against the validity of the notice dated 4th November, 1991 issued by the respondent No.1 under section 148 of the Income Tax Act, 1961 (‘the Act’ for short).

FACTUAL MATRIX

2. The factual matrix reveal that the petitioner had filed its return for the assessment year 1985-86 on 28th June, 1985 of which the relevant previous year ended on 31st December, 1984.

3. During the course of the assessment proceedings, the respondent No.1 was noticed by the Income Tax Officer and after full satisfaction with the explanation furnished by the petitioner, the order of assessment came to be passed on 28th January, 1988. The assessment was thus completed by the respondent No.1 under section 143 (3) of the Act. The petitioner's negative income for the A.Y.1985-86 was assessed at Rs.91,157/-.

4. In order to reopen the aforesaid assessment, impugned notice dated 4th November, 1991 under section 148 of the Act came to be issued.

5. The respondent No.1 in the impugned notice has stated that she had reason to believe that the income of the petitioner chargeable to tax for the assessment year 1985-86 has escaped the assessment within the meaning of section 147 of the Act. She, therefore, proposed reassessment of the income of the petitioner for the assessment year 1985-86.

6. The petitioner, pursuant to the aforesaid notice has filed return and simultaneously, demanded reasons for reopening recorded by the Income-tax officer before issuing the notice under section 148 of

the Act.

7. The petitioner has preferred this present petition under Article 226 of the Constitution of India to challenge the notice since no reasons were furnished or disclosed to the petitioner and consequent action of reopening of the completed assessment.

8. On being noticed, the respondent No.1 appeared and filed return disclosing the reasons recorded on 31/10/1999 before issuing the notice under section 148 of the Act.

9. With the aforesaid material on record, the parties to the petition were heard.

SUBMISSIONS

10. Mr.Pardiwalla, learned counsel appearing for the petitioner-assessee submits that no material is available on record to justify the formation of belief; no allegations are to be found that failure to disclose any particular material on the part of the petitioner has resulted in escapement of income.

11. Mr.Parwidalla further submits that if the

power to reopen is to be exercised by the assessing officer beyond the period of 4 years, there must be a failure on the part of the assessee to disclose truly and fully all material facts required for assessment for that year and that must result in escapement of the income chargeable to tax. He further submits that no reopening is permissible on the basis of the change of the opinion. Mr.Pardiwalla, in support of his submission, placed reliance on the number of Judgments of this Court; one of such delivered in the case of **Hindustan Lever Ltd. V/s. R.B.Wadkar [(2004)268 I.T.R. 332]**. He pressed into service the observations of this Court quoted hereinbelow:-

> " The reasons recorded by the AO nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the AO to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the AO to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the AO to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the AO. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons.

> Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The AO, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the AO cannot be supplemented by filing or making oral submissions, otherwise, the reasons which were lacking in material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.

12. Mr.Pardiwalla also relied upon another Judgment of this Court in the case of **Cafrihans Indian Ltd. V/s. Tarun Seem, Dy.Commissioner of Income-tax & Ors. [(2004) 266 I.T.R. 566]**. He also relied upon one another Judgment of this Court in the case of **ICICI Bank Ltd. V/S. K.J.Rao [268 I.T.R. 303]** and place reliance particularly on para 12 of the said Judgment which reads as under :-

> " Under section 147 of the I.T.Act, concluded assessments can be reopened beyond a period of 4 years from the end of the relevant assessment years only if there is failure on the part of the assessee to disclose fully and truly all material facts necessary for the purpose of assessment. Having furnished all material facts even if an assessee erroneously claims higher depreciation, it will not be a case of failure to disclose fully and truly all material facts. At what rate the depreciation is to be claimed is a matter of legal inference to be drawn from the material facts. If

> the legal inference drawn from the material facts is erroneous it cannot be said that there is failure on the part of the assessee to disclose material facts. In the present case, on the material facts disclosed, the assessee had claimed depreciation at 40% and the same was allowed by the assessing officer. It is not the case of the revenue that the facts disclosed by the assessee were incorrect or that there were any other facts which were material for the assessment which have not been disclosed by the assessee. Under the circumstances, if there is no failure to disclose material facts, then, even if there is excess relief granted, the assessments cannot be reopened beyond the period of 4 years from the end of the relevant assessment years. This Court in the case of IPCA Laboratories Ltd. (supra) and in the case of Bhor Industries (supra) has held that notice for reopening of the assessment cannot be issued after a period of 4 years unless the escapement of income is on account of failure on the part of the assessee to disclose fully and truly all material facts. It has been further held that the explanation to section 147 of the I.T.Act has to be read with section 148 of the I.T.Act in its entirety. In the light of the aforesaid decisions,in the present case, there being no failure on the part of the assessee to disclose fully and truly all material facts, the impugned notices issued beyond the period of 4 years from the end of the relevant assessment years are liable to be held to have been issued in contravention of the provisions of the Income Tax Act."
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> (emphasis supplied)

13. Mr.Pardiwalla, thus, contends that impugned notice is liable to be set aside and petition be allowed with all consequential reliefs prayed in the petition.

14. Per contra, the learned counsel appearing for the respondent - Income Tax department by way of preliminary objection urged that the writ petition at

the instance of the petitioner is not maintainable since alternate remedy is available to the petitioner. He further tried to support the action of the department, but could not take his submission to its logical end. He could not justify reopening beyond the period of 4 years from the end o f the assessment year in question.

CONSIDERATION :

15. We have heard rival parties. When asked, how alternate remedy could have been resorted to by the assessee without knowing the reasons recorded for reopening, learned counsel for the Revenue conceded that in absence of communication of the reasons; the assessee could not have resorted to alternate remedy. He thus agreed that in the facts and circumstances of the case it was open for the petitioner to invoke writ jurisdiction of this Court.

16. So far as the power invoked by the assessing officer to reopen assessment beyond the period of 4 years as urged by the petitioner is concerned, the learned counsel for the Revenue could not justify the reopening based on the material available on record. He fairly conceded that reopening is beyond the period of 4 years from the end of the assessment year and no

circumstances justifying such reopening beyond four years is available on record. Since the reopening is beyond the period of 4 years, in the absence of any material to show that there is failure on the part of the assessee to disclose fully and truly all material facts, the reopening of the assessment cannot be sustained. The reasons recorded for reopening the assessment do not state that there is any failure on the part of the assessee to disclose fully and truly any material facts. Mere fact that a protective assessment has been made in the case of some other assessee on the ground that the income of that assessee is assessable in the hands of the assessee herein cannot be a ground to reopen the concluded assessment of the assessee. Since the conditions required for reopening the assessment beyond the period of 4 years are not satisfied, in the facts of the present case, in our considered view, the notices issued are without jurisdiction and the same are liable to be quashed and set aside on this short ground. Since we are setting aside the notices on this ground alone, it is not necessary for us to go into other number of points; which Mr.Pardiwalla has raised.

CONCLUSION :

17. In the result, the petition is allowed.

impugned notices are quashed and set aside. rule is made absolute in terms of prayer clauses (a), (b) & c) of the petition with no order as to costs.

(V.C. DAGA, J.)

(J.P.DEVADHAR, J.)